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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1052, Misc.

WALTER LOGAN,
Petitioner,
v.
EMPRESA LINEAS MARITIMAS ARGENTINAS
ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

Suit was commenced by petitioner longshoreman in the Massachusetts State Court for the District of Massachusetts. Petitioner sought recovery from respondent Empresa Lineas Maritimas Argentinas (hereinafter "Empresa") for personal injuries allegedly sustained while engaged in longshoring operations as an employee of respondent Jarka Corporation of New England (hereinafter "Jarka") on board a vessel owned by Empresa.

Throughout the litigation petitioner maintained that the accident resulted from a short hatch cover:

> In response to an interrogatory asking what improper or not reasonably safe condition of the hatch

caused his accident, petitioner answered: "Hatch cover was short and did not fit properly . . . Caused me to fall." (R.A. 156.)

Petitioner's counsel, in his opening, said: "Now, the evidence of the plaintiff, the plaintiff's evidence from experts will be that that hatch board was not reasonably fit for the purpose it was used, that the hatch board was short—it had to be short. That was the reason why the hatch board went down when Mr. Logan stepped on it." (R.A. 104.)

Petitioner himself testified on cross-examination:

"XQ. Now, you really don't know what caused the accident, do you, Mr. Logan? A. A short hatch cover." (R.A. 121.)

"A. No, the cover was short." (R.A. 121.)

"XQ. It didn't look short to you did it? A. Not until I stepped on it. XQ. It didn't look short then? A. It was short then." (R.A. 121.)

"A. It was short." (R.A. 122.)

"A. It had to be a short cover." (R.A. 122.)

In closing argument petitioner's counsel said: "Members of the jury: I am going to show you how this accident happened . . . I say from all the evidence here, that you can only come to one conclusion; that the hatch cover was short. That it went down because it was short. . . . I feel that you can only come to one conclusion in this, and answer Question 'A-1', 'The hatch cover board was short of the proper length'." (R.A. 72, 74.)

An eyewitness to the accident testified that the board was not faulty (R.A. 68, 146); a Maritime Safety Officer of

the Department of Labor testified that he inspected the same board shortly after the accident and found that it fitted "very tight" and that it was not short (R.A. 61).

The jury found specially that the board was not "short of the proper length," and that it "fell for unexplained reasons." After additional argument and instructions, the jury further gave an affirmative answer to the question: "Was the hatch cover reasonably fit for its intended purpose, that is, was the ship 'seaworthy' as the Court has defined that term?" (R.A. 88, 91, 94).

Argument.

The Supreme Court of the United States should refuse to grant a writ of certiorari for review of the judgment of the United States Court of Appeals for the First Circuit under Supreme Court Rule 19, for the following reasons:

(A) The decision of the court below conflicts neither with applicable decisions of this Court nor with a decision of another Court of Appeals; and

(B) The court below did not depart from the accepted and usual course of judicial proceedings, nor sanction such a departure by the lower court so as to call for exercise of this Court's power of supervision.

A. No Conflict among Circuits.

The opinion of the Court of Appeals (Pet. App. 29-30; 353 F. 2d 373, 376-377) demonstrates the inaccuracy of petitioner's contention that the courts below erred in applying the substantive maritime law as enunciated by this Court and the several Circuit Courts.

First, in its charge defining "unseaworthiness" (Pet. App. 28-29; 353 F. 2d at 377) the trial court correctly

stated the rule laid down in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550, 1960 A.M.C. 1503, 1512 (1960). Second, the Circuits are agreed that the mere occurrence of an unexplained accident does not compel a finding of unseaworthiness. (The cases are conveniently collected in the opinion of the Court of Appeals) (Pet. App. 29-30; 353 F. 2d at 377).

Petitioner's real complaint is that the jury did not share his belief that the hatch cover was short and the vessel unseaworthy. During the trial, petitioner's credibility had been seriously impeached (R.A. 33-36; 126-139; 167-171); other evidence directly refuted his "short-board" theory (R.A. 61, 68, 146). Faced with all the evidence, including petitioner's demeanor when confronted with inconsistencies in his testimony (Petitioner's Brief, p. 15), the jury was well entitled to reject petitioner's entire theory of liability, and to find that petitioner had not sustained his burden of proof. The jury specially found the vessel seaworthy.[1]

The Court of Appeals properly refused to disturb the jury's findings of fact, applying the settled rule that no appellate court "can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the

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[1] Petitioner wrongly asserts a conflict between the decision below and *Grillea* v. *United States*, 232 F. 2d 919, 1956 A.M.C. 1009 (2d Cir. 1956); *Van Carpals* v. *The S.S. American Harvester*, 297 F. 2d 9, 1962 A.M.C. 395 (2d Cir. 1961), cert. den. 369 U.S. 865, 1962 A.M.C. 2212, reh. den. 370 U.S. 914 (1962); *Vega* v. *The Malula*, 291 F. 2d 415, 1961 A.M.C. 1698 (5th Cir. 1961); and *Beeler* v. *Alaska Aggregate Corp.*, 336 F. 2d 108, 1964 A.M.C. 1976 (9th Cir. 1964), cert. den. 379 U.S. 1000 (1965). All these cases were court-tried; in each the judge found facts pointing to unseaworthiness and the appellate court merely applied the law to those facts. In none was there a jury finding.

United States, than according to the rules of the common law.' . . . Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc.*, v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 358, 359, 364, 1962 A.M.C. 565, 568, 572 (1962). The courts "must attempt to reconcile the jury's findings, by exegesis if necessary . . . before we are free to disregard the jury's special verdict and remand the case for a new trial." *Gallick* v. *Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 119 (1963).

B. No Review Required.

Petitioner's claim of prejudice on the part of Judge Wyzanski was fully briefed and argued before the Court of Appeals, and was thoroughly treated in that court's opinion. Nothing would be gained here by any *seriatim* discussion of petitioner's claims of prejudice or hostility. When examined in context, it is apparent that the items individually and collectively fall well within the accepted limits of judicial participation. Counsel's conduct was deliberately provocative, as a reading of the entire transcript will show. Indeed, the selections which petitioner himself has cited to this Court establish the mildness of the District Court's response to, and the accuracy of the Court of Appeals' characterization of, counsel's behavior.

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95 (1931). It is a federal judge's function "to conduct the trial in an orderly way with a view to eliciting the truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscured, that

the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarily long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the witnesses." *Kettenbach* v. *United States,* 202 Fed. 377, 385 (9th Cir. 1913).

Conclusion.

It is respectfully submitted that petitioner has exhibited no compelling reason for granting the petition for writ of certiorari and that the petition should therefore be denied.

SEYMOUR P. EDGERTON,
Attorney for Respondent
EMPRESA LINEAS
MARITIMAS ARGENTINAS.

ROBERT J. HALLISEY,
HILLER B. ZOBEL,
Of Counsel.